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Supreme Court of the United States.

October Term, 1922.

HENRY FREYGANG and ALBERT A. TROCON,
Partners, doing business under the firm
name of THE MIDLAND BRIDGE COM-
PANY, *Appellants*,

v.
THE UNITED STATES.

} No. 480.

Appeal from the Court of Claims.

BRIEF FOR APPELLANTS.

GEORGE A. KING,
WILLIAM B. KING,
GEORGE R. SHIELDS.

Attorneys for Appellants.

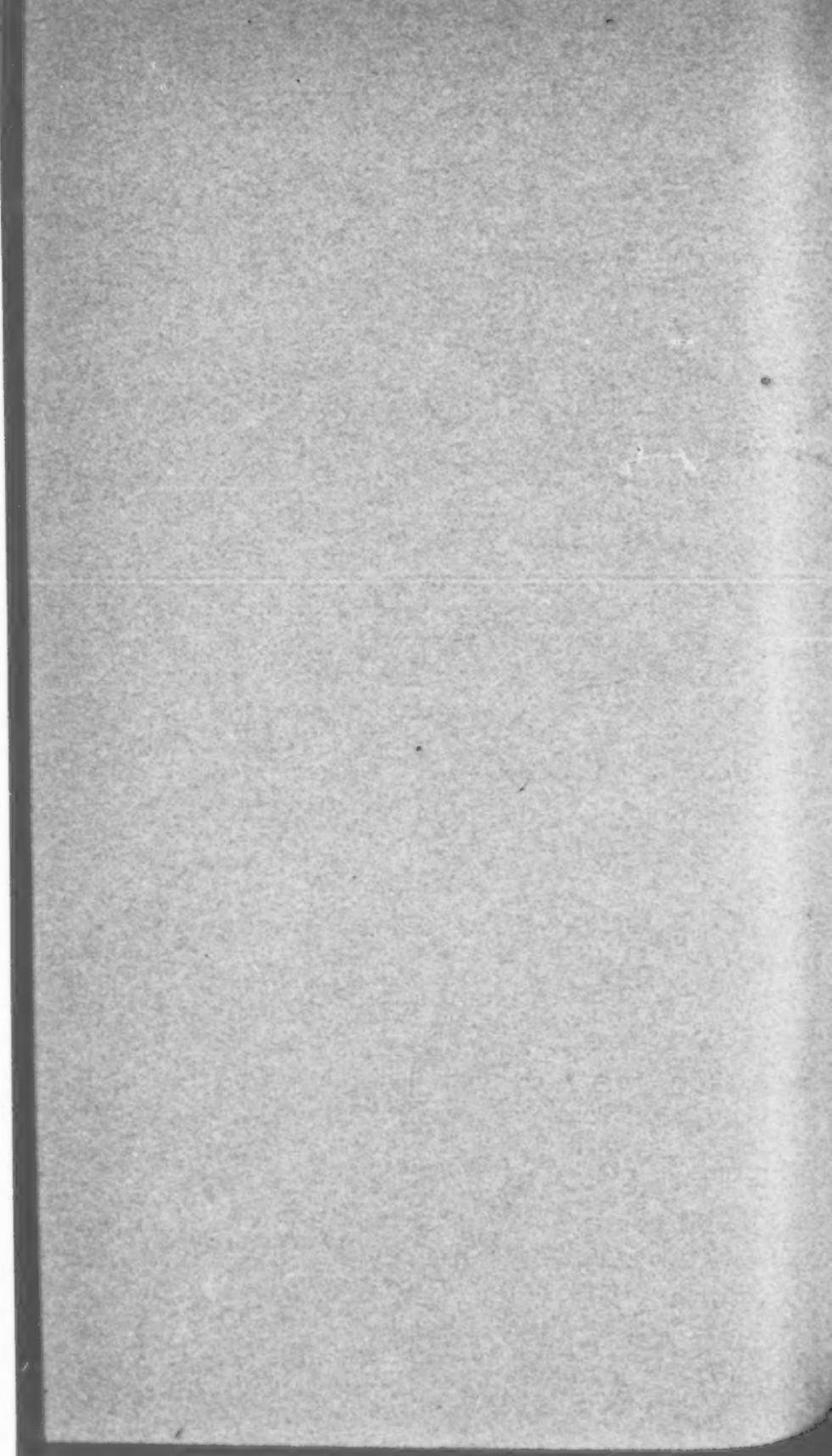
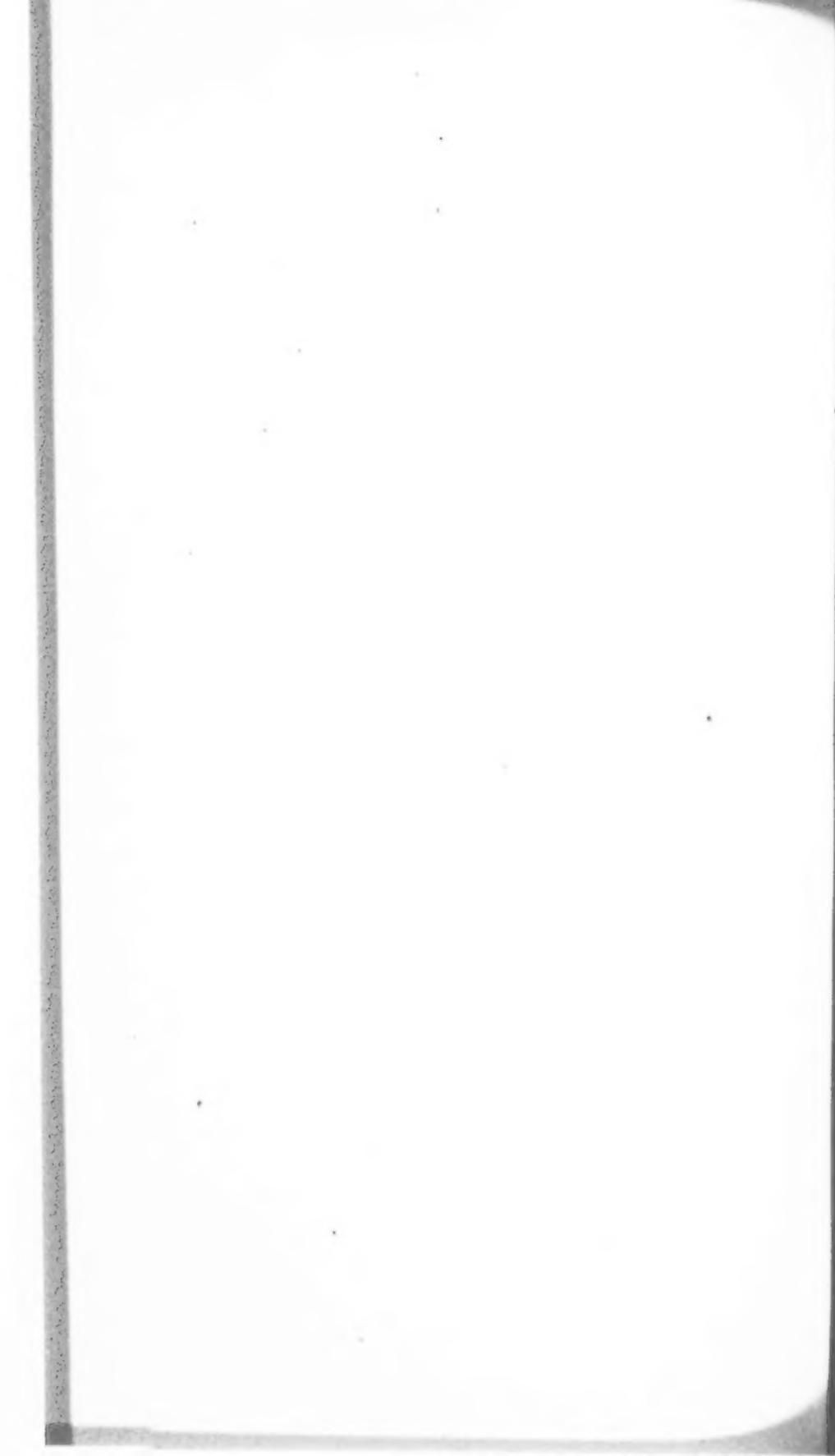


TABLE OF CONTENTS.

I. STATEMENT OF THE CASE	1
Contract of July 20, 1917	1
Contract of July 16, 1918	2
Contract of April 14, 1920	5
Authority for Making Contracts	6
The Opposing Contentions	9
II. ASSIGNMENT OF ERROR	10
III. BRIEF OF ARGUMENT	10
Scope of Act of June 15, 1917	10
Law Unnecessary in Case of Public Contracts	13
Requisitioning of Contracts	13
Power to Modify U. S. Contracts	16
Contract Right to Modify	17
The Contract a Compromise	18
A Valid Agreement of Settlement	19
Claim Liquidated by Parties	20
CONCLUSION	22
Appendix	
Congressional Debates on bill which became act of June 15, 1917, Ch. 29, 40 Stat. 182	23

TABLE OF CASES.

<i>Binns v. United States</i> , 194 U. S. 486, 495	12
<i>Duplex Co. v. Deering</i> , 254 U. S. 443, 447	13
<i>Hart v. Pennsylvania Railroad Co.</i> , 112 U. S. 331	21
<i>Lowrey v. Hawaii</i> , 206 U. S. 223	17
<i>Murray v. Charleston</i> , 96 U. S. 432, 445	16
<i>United States v. Corliss Engine Co.</i> , 91 U. S. 321	19, 20
<i>United States v. St. Paul, etc.</i> , 247 U. S. 310, 318	12



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I. STATEMENT OF THE CASE.

CONTRACT OF JULY 20, 1917.

By the first of three contracts made between the parties, dated July 20, 1917, not fully contained in the record and not sued on, but the substance of which is set out in the next contract, record, pp. 4-20, the appellants agreed to construct six wooden hulls according to the terms and conditions set forth in that contract. Under that contract the appellants in the performance thereof had been required by orders of the owner to make changes in plans and specifications for which and for additional reasons the appellants alleged they were damaged and suffered losses amounting approximately to \$136,000 "the just and fair settlement of which it is believed will be impossible and will lead to dissatisfaction, disputes and delays" (Exhibit A, record, below middle p. 4).

For this and other reasons it was the desire of both parties to cancel the contract of July 20, 1917, to make a new contract to complete the work remaining to be done under the contract of July 20, 1917, and for doing certain additional work (record, foot p. 4). Said contract of July 20, 1917, was therefore cancelled July 16, 1918 (record, top p. 5, Art. I, Par. 1).

CONTRACT OF JULY 16, 1918.

This contract is set out in full as an exhibit to the petition (pp. 4 to 20) and is the contract here sued upon.

After cancelling the contract of July 20, 1917, the appellants acknowledge reimbursement for all expenditures made and full satisfaction of all payments due under the contract of July 20, 1917, and waive all rights to receive any profit or remuneration whatsoever for services performed or work done under that contract (rec. top p. 5, Art. I, Par. 2).

There is a full waiver of all damages and claims of every kind (Art. I, Par. 3, near middle of p. 5 of record), as well as of all claims to ownership in the hulls and in the plant, machinery, tools, equipment, etc., with some exceptions (Par. 4, record, p. 5). The owner agrees to pay \$60,000 if and when the original six hulls are completed and accepted, one-sixth of said sum, or \$10,000, to be paid to the contractor as each of said hulls is completed and accepted by the owner (Par. 5, rec. pp. 5, 6). A further payment is made for certain items amounting to nearly \$20,000 (Par. 6, p. 6).

The contractor is to complete the six hulls partly completed (Art. II, Par. 2, near foot p. 6) and also to complete two wood hulls suitable for cargo-carrying steamers of an estimated deadweight capacity of 3,500 tons (foot p. 6).

The contractor is also to construct under specifications attached ten complete 3-masted wooden schooner barges of 2,500 tons deadweight capacity (Par. 4, top p. 7).

Article II ends with the following paragraph which is the one here involved (rec. near top p. 7):

"Provided, however, that if for any reason whatsoever the Owner hereafter deems it inadvisable to proceed with the construction of any of the aforementioned hulls or barges, and notifies the Contractor to that effect in writing, the Contractor shall comply with the order of the Owner in that regard, with an obligation on the Owner, however, to substitute other hulls or barges of different design or size, which it is agreed the Contractor shall construct under the terms and conditions hereof for a fee to be determined by the Owner, but which shall be in proportion to the fees herein to be paid, according to the character and design of the substituted boat."

Delivery dates are specifically provided for in Art. 4 (rec. pp. 7, 8), as to the original six hulls, the two Ferris type hulls, and the ten barges (Art. IV, foot p. 7, top p. 8).

Article VII (pp. 9, 10) provides for the payment of the actual cost of the work, the elements of cost being distinctly defined.

In addition to the actual cost of the work so defined, the contractor was to receive a fixed fee on certain of the vessels to be constructed as follows (rec. p. 11, Art. IX):

"Contractor's Fee.

"In consideration of the faithful performance of this agreement by the Contractor, the Owner shall pay the Contractor for services in doing, to the satisfaction of the Owner, all the work which the Owner may order to be done at and upon said yard, as herein provided, and for completing the construction of said two Ferris

type hulls, the sum of \$8,000 per hull, and for constructing the ten barges as herein provided, the sum of \$6,000 per barge for each of said ten barges, said fee to be paid as to each hull and barge respectively when the same is delivered to and accepted by the Owner, and in addition thereto, shall pay to the Contractor one-half of the saving effected if Contractor builds said two additional Ferris type hulls at an average actual cost under \$360,000.00, the estimated cost thereof per hull, and said \$360,000.00, it being definitely understood that the fee herein provided is for any and all work on the yard which the Owner may order as herein provided, as well as on hulls and barges; that the Contractor in consideration of the compromise settlement herein made, shall complete the original six hulls now under construction without fee or remuneration of any kind; that the said purchase price of \$60,000.00 for Contractor's interest in said yard and said reimbursement of \$19,240.32 herein agreed upon, and said fee on new hulls and barges as herein provided, and the amount which the Contractor may earn by building said Ferris hulls for less than \$360,000.00 each, shall be all the remuneration of any kind whatsoever which the Contractor shall receive hereunder, excepting any larger fee that may be paid for substituted hulls or barges of a different type or design as provided in Article II hereof."

Other provisions of this specific and complete contract require no special mention here.

It is found as a fact that appellants proceeded with the work under the new contract of July 16, 1918, until October 28, 1918, when notified that said contract was cancelled and ordered to stop work. (Finding III, par. 1, near foot p. 25).

By immediately following communications the Owner modified this order of October 28th by making it apply only to eight of the ten barges called for by the contract and notified the appellants that otherwise the contract was in full force and directed them to proceed with the

work not cancelled, which work was later completed by the appellants (Finding III, par. 2, foot p. 25).

The appellants were at that time in a position to proceed with the construction of the eight barges, work on which had been ordered to be stopped, or upon barges of different character and design which might be substituted by the Fleet Corporation as provided by the contract. But at no time was any direction or permission given to the appellants to proceed with the eight barges or any substituted barges or hulls in place thereof. The action of the Fleet Corporation in reducing the number of barges was not due to any fault on the part of the appellants (Finding IV, top p. 26).

CONTRACT OF APRIL 14, 1920.

By this contract (record, pp. 20-23) the two previous contracts were recited and it was stated that the appellants had presented claims for fees on account of the suspension of work on the eight barges.

After other provisions, it was provided (p. 22):

“Article V.

“The Owner shall pay to the Contractor the sum of nine thousand (\$9,000) as an advance payment on account of fees for the barges which are hereby cancelled.”

“Article VI.

It is understood and agreed that the Contractor expressly reserves unto itself the right to sue the Owner for such damages in the form of said fees for cancelled barges which are claimed by the Contractor in addition to the \$9,000 hereinbefore provided to be paid, and if upon the final outcome of any such suit, it shall be determined that the Owner is liable to the Contractor for an amount in excess of the \$9,000 hereinbefore provided, the Owner shall pay to the Contractor such additional amount so determined.”

It is found by the Court of Claims (Findings VII and VIII, rec. p. 27) that appellants asserted a claim for a fee of \$6,000 for each of said cancelled barges, making a total of \$48,000, claimed as due under the contract, upon consideration of which the appellants were offered \$12,000 as a compromise settlement and final adjustment which appellants refused to accept.

After appellants' refusal to accept the offer, defendants stated in a communication to them that it would make a careful investigation as to the proportion of work done on said cancelled barges and would arrive at a proportion of the fee that the appellants were entitled to receive based upon the portion of work performed with a view to allowing the appellants "to accept 75 per cent of the award and sue in the Court of Claims for the remainder." The amount so ascertained as an award was \$12,000 (Finding VIII, middle p. 27).

These communications and findings are not stated in the contract of April 14, 1920 (pp. 20-23).

AUTHORITY FOR MAKING CONTRACTS.

Prior to the date of any of these contracts, the President, July 11, 1917, promulgated an Executive Order, set forth in full in Finding XI (p. 28), directing "that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the construction of vessels, the purchase or requisitioning of vessels in process of construction, whether on the ways or already launched, or of contracts for the construction of such vessels, and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase, and requisitioning of materials for ship construction."

This order was in pursuance of the act of June 15, 1917 (Chap. 29, 40 Stat. 182, 183), the material provisions of which are as follows:

“An Act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June 30, 1917, and for other purposes.

“Emergency Shipping Fund.

The President is hereby authorized and empowered, within the limits and amounts herein authorized—

(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.

(b) To modify, suspend, cancel or requisition any existing or future contract for the building, production, or purchase of ships or material.

(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order.

(d) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant.

(e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed, or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship.

Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any

person owning any ship, charter, or material, or owning leasing, or operating any plant equipped for the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities or qualities of the ships or material so ordered at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material or plant of such person, or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary and expedient.

Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire, or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by Section 24, paragraph 20, and Section 145 of the Judicial Code.

The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time: *Provided*, That all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended. All ships constructed, purchased, or requisitioned under authority herein, or heretofore or hereafter acquired by the United States, shall be managed, operated, and disposed of as the President may direct.

The word 'person' as used herein, shall include any individual, trustee, firm, association, company, corporation, or contractor.

The word 'ship' shall include any boat, vessel, or submarine and the parts thereof.

The word 'material' shall include stores, supplies, and equipment for ships and everything required for or in connection with the production thereof.

The word 'plant' shall include any factory, workshop, warehouse, engine works; buildings used for manufacture, assembling, construction, or any process; any shipyard or dockyard and discharging terminal or other facilities connected therewith.

The words 'United States' shall include all lands and waters subject to the jurisdiction of the United States of America.

All authority granted to the President herein, or by him delegated, shall cease six months after a final treaty of peace is proclaimed between this Government and the German Empire."

THE OPPOSING CONTENTIONS.

The Court of Claims construed the above provision as to modifying, suspending, cancelling, requisitioning, etc., any contract as applying not only to the modification, suspension cancellation or requisition of contracts between private parties, but also to modifying, suspending, requisitioning, etc., of contracts between the United States and private parties.

Having found therefore that \$12,000 had been ascertained as just compensation by the Fleet Corporation acting as the President's agent, and that \$9,000 thereof had been paid, the Court of Claims gave judgment only for the balance of \$3,000.

The contention of the appellants, on the other hand, was and is that the provisions of the act of June 15, 1917, had exclusive reference to the requisitioning, cancelling, etc., of contracts between private parties

and did not refer to the cancellation of a contract between the Government and a private party. It was therefore claimed on behalf of the appellants that they were entitled to recover the full fees of \$48,000, that is, fees on the eight cancelled barges at the rate of \$6,000 a barge, less the \$9,000 paid under the agreement of April 14, 1920, making the balance claimed \$39,000.

This is claimed as the compensation specially agreed upon by the parties, and therefore the "just compensation" fixed by the contract to cover any cancellation thereof, partial or entire. This suit is for the sum stated.

II. ASSIGNMENT OF ERROR.

The appellants assign for error the following rulings of the Court of Claims:

1. That said court construed the provisions of the act of June 15, 1917 (Chap. 29, 40 Stat. 182), under the heading "Emergency Shipping Fund" as authorizing the United States to "modify, suspend, cancel or requisition any contract" made by the United States and not as authority merely to "modify, suspend, cancel or requisition" contracts made between private parties.
2. That said court failed to give judgment in favor of the appellants for the amount of its fixed fees for the completion of the eight barges amounting to \$48,000, subject to a credit of \$9,000 paid under the settlement agreement of April 14, 1920, in the sum of \$39,000.

III. BRIEF OF ARGUMENT.

SCOPE OF ACT JUNE 15, 1917.

From what has been said it will be seen that this case presents the broad question of the scope and effect of the provision entitled "Emergency Shipping Fund" in the Military and Naval urgent deficiency appropriation

act of June 15, 1917 (Chap. 29, 40 Stat. 182, 183, *ante*, pp. 7-9).

The act in question is one of a series of statutes relating to ships and war material passed from time to time during the war with Germany and even somewhat antedating it.

The first of such acts was the Naval appropriation act of March 4, 1917 (Chap. 180, 39 Stat. 1168).

By the provisions of this act under the heading "Naval Emergency Fund" (pp. 1192, 1193) similar provisions as to ships and war material were made authorizing the President "to modify or cancel any existing contract."

The several reports (all of the 65th Congress, 1st Sess.) on H. R. 3971 which ultimately became the act of June 15, 1917, are House Report No. 36, original report; Senate Report No. 41, original Senate Report; House Report No. 61, House report on this very Senate amendment here involved; House Reports Nos. 67, 70 and 74, all of them conference reports, the last two dealing with this very amendment. In none of them is there any suggestion that this was intended as more or other than requisitioning or commandeering legislation.

Moreover in a letter written by the Secretary of the Navy to the President of the Senate while this very bill was pending and urging the grant of a broad commandeering power, the very question of vessels under contract by their owners to private parties was thus referred to (Senate Doc. No. 31, 65th Cong. 1st Sess.):

"Sir:—Referring to my previous letter on the above subject, I have to again call your attention to the absolute necessity of this department being authorized to commandeer the necessary sea tugs to tow small craft to be used for patrol purposes abroad. These vessels

can not proceed under their own power, and the Government has no tugs available, nor can it, without the authority to commandeer purchase the necessary tugs. The owners have contracts which would render them liable to penalties for the violation thereof under any other conditions than the tugs being commandeered by the Government."

By the act of April 22, 1918 (Chap. 62, 40 Stat. 535), the act of June 15, 1917, which we are here considering was amended by adding a new provision authorizing the President "to take possession of, lease or assume control of" any interurban railroad, and providing as in the act of June 15, 1917:

"The President may exercise the power and authority hereby vested in him through the several departments of the Government, and through such agency or agencies as he shall determine from time to time."

By the naval appropriation act of July 1, 1918 (Chap. 114, 40 Stat. 704), it was provided (pp. 719, 720) that the President might place an order, modify or cancel any existing contract for the building, production or purchase of ships or war material, and that whenever he did cancel, modify or requisition a contract just compensation should be determined by the President and paid.

Further provisions were made in the same direction by the deficiency act of November 4, 1918 (Chap. 201, 40 Stat. 1020, 1022).

None of these statutes have any relation to contracts made with the United States itself.

The debates in Congress on the act of June 15, 1917, so far as they were the expression of the members in charge of the bill, are admissible and proper guides to the interpretation of the statute. (*Binns v. United States*, 194 U. S. 486, 495; *United States v. St. Paul*, etc.,

247 U. S. 310, 318; *Duplex Company v. Deering*, 254 U. S. 443, 447.) If any weight is to be attached to the expressions made by the leaders of Congress when this bill was under consideration, there can be no doubt that it was not intended by Congress that this legislation should apply to public contracts made by the United States itself, but only to private contracts between private individuals. Extracts from these debates are given as an appendix hereto, *post*, pp. 23-31.

LAW UNNECESSARY IN CASE OF PUBLIC CONTRACTS.

If the act were intended as authorizing the modification, suspension or cancellation of existing or future contracts of the United States, it was wholly unnecessary. In the case of *existing* contracts, one party to a contract is always at liberty to modify his contract by agreement with the other or to break it absolutely, subject to the legal consequences of such an act. In the case of *future* contracts, such contracts could be made to embody whatever terms in that behalf the circumstances of the time required. An authority to modify, suspend or cancel contracts was necessary only in the case of strictly private contracts, but a change in existing law was not the appropriate way to modify the contracts of the United States.

REQUISITIONING OF CONTRACTS.

The requisitioning of contracts between private parties for ships and war material was practiced on a large scale by the United States during the world war. One of the best instances that can be given of this practice is shown by the arbitration of the claims of Norwegian citizens having contracts with American shipyards for the construction of vessels in the course of

execution at the time of the entry of the United States into the world war.

The Hague arbitral tribunal decided in such cases that there was a complete requisitioning not only of the ships themselves but of the contracts also. The full text of the award is contained in Senate Document No. 288, 67th Congress, 4th Session.

It is there stated (pp. 9, 10):

"For some time before the declaration of war the question of requisitioning ships by the United States had been considered and the fact that early in 1917 a large proportion of the shipyards in the United States was engaged with contracts for foreign shipowners led to various proposals and negotiations into which it is unnecessary to enter here. On the 4th of March, 1917 (after the severance of diplomatic relations between the United States and Germany on February 3rd, 1917), a Naval Emergency Fund Act was passed (ch. 180, 39 Stat. 1168, 1192, 1193). This Act authorized and empowered the President, 'in addition to all other existing provisions of law' within the limits of the appropriation available, 'to place an order with any person for such ships or war material as the necessities of the Government, to be determined by the President, may require and which are of the nature, kind and quantity usually produced or capable of being produced by such person.' Such orders were given precedence over all other orders, and compliance was made obligatory. In the case of non-compliance, the President was authorized to 'take immediate possession of any factory * * * or of any part thereof.' The President was furthermore empowered, under the same penalty 'to modify or cancel any existing contract for the building production, or purchase of ships or war material,' to place an order for the whole or any part of the output of a factory in which ships or war material were being built or produced, and to 'requisition and take over for use or operation by the Government any factory, or any part thereof.' In all cases where these powers were

exercised, provision was made for 'just compensation' to be determined by the President, with the customary provision for an appeal to the courts.

Then on June 15, 1917, two months after the declaration of War, further important powers were given to the President by the Emergency Shipping Fund Provision of the Urgent Deficiencies Act."

(Here follows the text of the act of June 15, 1917, set forth, *ante*, pp. 7-9).

"Up to the date of this Act, though different proposals had been mooted, no definite action as regards requisitioning ships or contracts for ships had been taken" (p. 11).

* * * * *

"The order contained in the letter of August 3rd expressly requisitioned not only the ships and the material, but also the contracts, the plans, detailed specifications and payments made, and it even commandeered the yards (depriving them of their right to accept any further contracts). In spite of this the United States have contended that there was no requisition, except of 'physical property' and have strongly maintained that the word 'contract' in the letter of 3rd of August only referred to commitments for material" (p. 11).

The tribunal stated as its decision (Senate Doc. 288, p. 26):

"The United States intended to 'take' and have 'taken' in fact, the contracts under which the fifteen hulls in question were being constructed by American Shipbuilders in 1917. These contracts were the property, or created it, and what the United States call 'physical property' is only one of the elements or aspects of the 'property' under the municipal law of the United States, as well as under the law of Norway and other States. It is common ground that, in the absence of any treaty, the Norwegian owners of these contracts were protected by the fifth amendment of the Constitution of

the United States against any expropriation not necessary for public use, and that they are entitled to just compensation if expropriation occurs."

Nearly \$12,000,000 was allowed by that tribunal as the value of the contracts requisitioned or appropriated by the United States.

From this it will be seen that there is ample room for the operation of the provisions of the act of June 15, 1917, as applied to the requisitioning or cancellation of private contracts, without construing it as an act regulating public contracts of the United States.

POWER TO MODIFY U. S. CONTRACTS.

In *Murray v. Charleston*, 96 U. S. 432, the city of Charleston had issued certain stocks or bonds obligating the city to pay interest thereon at prescribed rates. Under a later ordinance taxing real and personal property, the interest due on bonds belonging to Murray, a non-resident, was reduced by the amount of taxes assessed against such bonds and he brought suit for the amount thus withheld. In sustaining his right to recover, this court, speaking through Mr. Justice Strong, said, p. 445:

"The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons. Hence, instead of there being in the undertaking of a State or city to pay, a reservation of a sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity."

In *Lowrey v. Hawaii*, 206 U. S. where a change in basic law was urged as a sufficient justification for breach of contract, the court said (p. 223):

"It is no defense that the government's policy has changed. It can not so release itself from its engagements."

In no case of contract between shipyards and private individuals could the United States, any more than any other third party, assume, without special authority of law or agreement with the contracting parties, to take over the rights or liabilities of either of such parties. The war needs of the government imperatively demanded that all facilities then engaged in private work be diverted to work of a public character and the act of June 15, 1917, was enacted to make such a diversion possible. The act had nothing to do and was not intended to have anything to do with contracts made by or on behalf of the government as a contracting party. The use of the word "requisition" shows that the authority granted related to private and not to public contracts. The United States might modify, suspend or cancel its own contracts, but even under this legislation, if it applies to government contracts at all, the United States could not "requisition" for its own that which it already had.

By every sound rule of construction, and in the light of the debates in Congress when this law was in course of enactment, it must be concluded that the act of June, 1917, conferred on the United States no special right or authority to modify, suspend or cancel any such contract as that now in suit.

CONTRACT RIGHT TO MODIFY.

The contract, Article II, rec. p. 6, after describing the work to be done had this proviso, p. 7:

"Provided, however, that if for any reason whatsoever the Owner hereafter deems it inadvisable to proceed with the construction of any of the aforementioned hulls or barges, and notifies the contractor to that effect in writing, the Contractor shall comply with the Order of the Owner in that regard, with an obligation on the Owner, however, to substitute other hulls or barges of different design or size, which it is agreed the Contractor shall construct under the terms and conditions hereof, for a fee to be determined by the Owner, but which shall be in proportion to the fees herein to be paid, according to the character and design of the substituted boat."

This provision is clear and unambiguous. Whether or not the act of June 15, 1917, is to be construed as authorizing generally the modification or suspension of existing or future contracts, public as well as private, on payment of just compensation therefor, the contracting parties here specially agreed on another rule of conduct, namely, that the United States might modify or suspend this contract at its election, but that in such case the contractors would be given other work affording an equivalent compensation or fees. In other words, they specifically agreed that the subject-matter of the contract might be changed, but that the consideration therefor, or compensation, should remain constant in any event.

THE CONTRACT A COMPROMISE.

The contract of July 16, 1918 (rec. pp. 4-20), was not a new and independent contract, but a compromise and settlement of numerous questions and disputes that had arisen under an earlier contract. The \$6,000 per barge, fixed as the measure of the contractor's compensation (Art. IX, p. 11) was not alone their compensation or fee for supervising the work of constructing said barges,

but included their compensation for the relinquishment of rights under the earlier contract (Article IX, Rec. p. 211):

"It being definitely understood that the fee herein provided is for any and all work on the yard which the Owner may order as herein provided, as well as on hulls and barges; that the Contractor in consideration of the compromise settlement herein made, shall complete the original six hulls now under construction without fee or remuneration of any kind; * * *."

This accounts for the agreement of the parties that in event of cancellation of any part of the work the contractor should be given other work affording an equivalent fee. In other words, the \$48,000 that was to be paid as fee or compensation for supervising the construction of eight barges was the fee not alone for supervising those barges but for completing the six hulls previously completed, for relinquishment of claims under the earlier contract, etc.

A VALID AGREEMENT OF SETTLEMENT.

In *United States v. Corliss Engine Company*, 91 U. S. 321, it was held that where the Secretary of the Navy was authorized by law to make a contract for vessels or their machinery his power extended by necessary implication to a contract of compromise and settlement.

The court said (p. 323):

"It would be a serious detriment to the public service if the power of the head of the Navy Department did not extend to providing for all such possible contingencies by modification or suspension of the contracts, and settlement with the contractors."

"When a settlement in such a case is made upon a full knowledge of all the facts, without concealment, misrepresentation, or fraud, it must be equally binding upon the government as upon the contractor; at least, such a settlement can not be disregarded by the gov-

ernment without restoring to the contractor the property surrendered as a condition of its execution.

"But aside from this general authority of the Secretary of the Navy, under the orders of the President, he was, during the rebellion, specially authorized and required by acts of Congress, either in direct terms or by specific appropriations for that purpose, to construct, arm, equip, and employ such vessels of war as might be needed for the efficient prosecution of the war. In the discharge of this duty, he made the original contracts with the claimant. The completion of the machinery contracted for having become unnecessary from the termination of the war, the secretary, in the exercise of his judgment, under the advice of a board of naval officers, suspended the work. Under these circumstances, we are of opinion that he was authorized to agree with the claimant upon the compensation for the partial performance, and that the settlement thus made is binding upon the government."

The situation here was similar. Rights had been acquired under the original contract of July 20, 1917. It was deemed to the interest of the government to settle those rights and to provide for other vessels more needed by the government. In compromise and settlement of all obligations under a previous contract it was agreed that some of the vessels originally provided for should be completed free of any fees or charge of completion, while the appellants should construct other vessels and should receive for the same certain fixed fees.

CLAIM LIQUIDATED BY PARTIES.

The effect of this contract was to obligate the government, by way of compromise, to pay the appellants certain agreed sums, subject to an option to substitute other work for the barges. That option it failed to exercise. This left the contract as a substantial liquidation of all prior controversies binding the government

to pay the sums therein provided. The cancellation provision thus in effect became a provision for damages liquidated and agreed upon in advance, which the government could modify, not by mere cancellation of the barges, but only by a cancellation followed by a substitution of other work.

In *Hart v. Pennsylvania Railroad Co.*, 112 U. S. 331, 341, it was held:

"The subject-matter of a contract may be valued, or the damages in case of a breach may be liquidated in advance. In the present case, the plaintiff accepted the valuation as 'just and reasonable.' The bill of lading did not contain a stated valuation according to the nature of the animal. It does not appear that an unreasonable price would have been charged for a higher valuation."

But it is said that it was not exactly the same size or character of boat or the same fee that was provided to be substituted for the original ones. In the opinion of the Court of Claims, it is suggested (near foot p. 30) that the fees to be substituted shall be "according to the character and design of the substituted boat."

The answer to this proposition is that whatever uncertainty there is, is caused by the default of the government in not substituting some other boats or barges. The court can not infer that they would have been different. The contract indeed seems to contemplate that the substitution would have been of larger boats or vessels.

In Article IX "Contractor's Fee" (p. 11) providing for the \$6,000 fee for each barge, provision is made that the reimbursement for expenses "and said fee on new hulls and barges as herein provided" and a certain amount of bonus provided for by the contract for the construction at less than the estimated cost of the

Ferris hulls, "shall be all the remuneration of any kind whatsoever which the contractor shall receive hereunder, excepting any larger fee that may be paid for substituted hulls or barges of a different type or design in Article II hereof."

This seemed to contemplate that the fees for the substituted barges might be greater than the fees provided for in the contract of 1918.

No other measure of fees having been substituted appellants are entitled to stand upon the measure of fees named in the contract. No other rate or amount having been substituted, the question whether a smaller one might have been substituted by the government in its discretion becomes purely academic.

CONCLUSION.

This case is one depending on express provisions of valid contracts. It is in no sense a case of requisitioning or commandeering such as is covered by the act of June 15, 1917, or other commandeering statutes as a case of ascertainment of "just compensation" as for requisitioned property. Even if it were such, the just compensation to which the appellants are entitled is the amount expressly stipulated in their contract.

The judgment of the Court of Claims should be reversed and the case remanded with instructions to enter judgment for the entire amount claimed, \$39,000.

GEORGE A. KING,
WILLIAM B. KING,
GEORGE R. SHIELDS,
Attorneys for Appellants.

APPENDIX.

Congressional debates on H. R. 3971, which became the Act of June 15, 1917, ch. 29, 40 Stat. 182.

The following extracts from debates thereon reported in Vol. 55 of the Congressional Record at the pages indicated, shed an interesting light on the question of what Congress understood and meant its provisions to imply.

Mr. Nelson, now Chairman Senate Judiciary Committee (p. 2511), said:

"Mr. President, this bill contains some very unusual and far-reaching provisions. * * * It authorizes the President—which, of course, in this case means the Shipping Board—

'(b) Within the limits of the amounts hereby authorized, to modify, cancel, or requisition any existing contract for the building, production, or purchase of ships or material; and if any contractor shall refuse or fail to comply with the contract as so modified or requisitioned, the President may take immediate possession of any factory of such contractor or any part thereof without taking possession of the entire factory, and may use the same for such times and in such manner as he may consider necessary or expedient.'

"It not only authorizes the Shipping Board to take possession of the ships which have been partially completed, to commandeer them, but it authorizes the board to change and modify contracts which have been made between the shipbuilder and the man who has a ship in process of construction."

Mr. Underwood (of the Committee on Appropriations) (p. 2513):

"We have to get the ships now building off the ways and operate the shipyards with three shifts in order to expedite the construction.

"If we want to accomplish anything for our allies, we have got to send them supplies, and we have got to get the ships to carry them. If we want to maintain an

army on the battlefield of France, we must have ships to carry them there and ships to carry their supplies. If we want to maintain navies on the seas, we must have fuel ships and supply ships. I want to say to Senators that, if this war is to be a success, the first question and the last question to be considered is ships, ships, and more ships. We can not start the war without ships, and we can not successfully conclude it without ships."

On page 2515, the following remarks are recorded:

"Mr. CALDER. Can the Senator tell me what is to be the policy of our Government toward these ships that are under construction?

"Mr. UNDERWOOD. In regard to taking these ships?

"Mr. CALDER. Yes.

"Mr. UNDERWOOD. I can not speak by the card on that. I shall be glad to give the Senator such information as I have. I know that our Government wants to clear the ways of the ships that are on them—that is the most important question—so that they can be used. Most of these contracts have been made on an eight-hour basis, with one shift a day. Our Government wants to put the work on a two' or three shift basis, so that we will expedite the building of the ships and make as great a use of the ways as possible. This bill provides for expediting the building of these ships. My information is, although I do not speak with any authority, that those ships that are nearing completion will be allowed to be completed in their usual course and go to the corporations or men or countries that have already contracted for them; but ships that are just beginning, and may occupy the ways for a considerable time, will probably be commandeered under this bill, in order that the Government may handle those ships, expedite them as rapidly as possible, and clear the ways to put their shipping in. That is the information I have.

* * * * *

"Mr. CALDER. Some of the shipbuilders I have talked to tell me that the effect of that will be to disorganize many of the yards, because it is difficult for them to conduct Government business upon this basis and conduct

private business under different conditions. It tends to add to the cost of construction, and very materially affects what we may have to pay for the ships.

"Mr. UNDERWOOD. From the evidence before the committee I do not think that power will be used. From the evidence that came before the committee I think it is clear that Gen. Goethals intended to build these ships by way of contract with the usual method, but he wants the power to accomplish the results if he can not do it the other way.

* * * * *

"Mr. KELLOGG. I was so far away that I could not hear the statement of the Senator from Alabama. Did I understand him to say that the ship contracts entered into with foreign owners that are nearly completed will not be interfered with?

"Mr. UNDERWOOD. They will not be interfered with if they are nearing completion. I will say to the Senator that my understanding is, from the testimony given before the committee, that most of these ships that are on the ways belonging to foreign nations are really for the Government of Great Britain, although the contract is not made in the name of the Cunard Co. There may be some few ships of foreign nations. If they are nearing completion, my understanding is that it is not the purpose of this Government to interfere with the contracts; but if they are not, and we have got to get the yards for the purpose of expediting matters, the contract will probably be taken over."

Page 2516:

"Mr. UNDERWOOD. I think a number of the members of the committee had grave doubt about the very question the Senator is now raising. When the bill was first under consideration it was stated before the committee by Mr. Denman, chairman of the Shipping Board, that except in the case of those ships the Government itself is using where it carries its own insurance, of course, a number of these ships are going to be let out on contracts to individuals, many of them just to go across the sea and come back again to carry their supplies. Where they are lost they are insured by the Government,

but the Government charges it to the freight and the freight is compelled to pay the cost of the ship. The statement was made before our committee, and I think it is borne out, that as far as our Government ship insurance is concerned we have not lost any money; we are making money out of it; because the statement was made before the committee that there is not a war insurance risk company in the world that is not to-day making a profit, because they magnify the risk in making the rates. Therefore we would not lose the ships.

"But I will say to the Senator, if that was all there was involved in the question I would be disposed to agree with the position he has taken in the matter and let the English Government take its own ships and run them and let them stay on the ways until they are finished; let the British Government have its own ships and we take ours. But in the final conclusion of the situation Gen. Goethals said to us that it was of the utmost importance to carry out this project that he should have the power to take over these English contracts, if he wanted to do it, to expedite this work. We do not compel him to do it.

"Mr. WEEKS. Let me ask the Senator if all the shipyards in the United States are not now working at full capacity.

"Mr. UNDERWOOD. Our information is that they are not; that they are working at full capacity on a single shift, an eight hours a day shift; but what our Government wants to do is to make them work on two or three shifts a day."

Page 2518:

"Mr. KNOX. I doubt, sir, whether it will ever be necessary for the President of the United States to commandeer any shipyard, any rolling mill, any steel works, or any other factory in the United States to expedite this work, but it is a good thing in the event of the unforeseen happening that he shall have that power.

"Mr. President, over and beyond all that, it is a good thing to have it go out to the nations of the world that

the Congress of the United States is going to be true to its pledge written in the war resolution that all the resources of this country are pledged to victory for our arms."

Page 2524:

"Mr. BRANDEGEE. I did not quite understand the statement the Senator made. Under the provision of the bill, as I understand it, the President has the right to modify any existing contract with the shipyards, and he has the right also to commandeer the yard if they do not furnish proper terms. Under that, even if the British contract did provide that the vessel should be constructed upon an eight-hour day, the President could modify the contract and say, 'You must run three shifts.' In that case, we certainly would get the British ships a good deal quicker than we would get them if the British contract were allowed to creep along to completion according to the contract.

"Mr. SMOOT. It is the intention of Gen. Goethals to force the building of ships."

Page 2525:

"Mr. SMOOT. Does the Senator really believe that if the President of the United States should ask England to expedite the building of these ships England would not do it?

"Mr. UNDERWOOD. Well, I have no doubt of England's doing it; but there are private contracts which exist between the shipbuilding companies of this country and the Cunard Steamship Line. When Gen. Goethals tells that it is of the utmost importance that he be given this power, I do not think he wants the power simply for the purpose of trying to coerce the British Government when he says that the British Government is prepared and ready to cooperate with him in this respect.

"There is something else behind it, and there is something else behind the fact that we have to fight here to get the power to commandeer these ships. I do not refer to the Senator from Utah, of course."

Senator Martin, in charge of the bill (p. 2527) said:

"I trust that the Senate will vote down the amendment that is offered by the Senator from Utah, the object of which is to take away from Gen. Goethals the discretion which the bill, as reported, gives him to take over these ships if he thinks it well to do so. He says he will not take over those that are nearly completed, but those that have a long-distant date for delivery he wants to take over, because he wants the ways. He not only wants these ships quickly constructed by expediting their construction so that we may have the use of them, but he wants to put more ships on those ways. I appeal to the Senate to give him the power that he asks, and to give him the power which the President of the United States, who is the Commander in Chief of our Army and our Navy, says is of vital importance to the successful conduct of this war on the part of the United States.

Page 2529:

"Mr. UNDERWOOD. The committee's bill is perfectly fair as it is written. It provides that any ship that is commandeered or any shipyard or anything else that is commandeered shall be paid for at a reasonable price to be agreed on between the President or those acting for him and the owner. If they can agree on a reasonable price, that is the end of it; but if they can not agree on a reasonable price, what is the result? The President is to pay the owner 75 per cent of what the President thinks is a reasonable price, and then the owner can go into court and sue for whatever he wants, and the court, with all the facts before it, will ascertain what is a reasonable price and give it to him."

Mr. Fitzgerald, Chairman House Committee on Appropriations, on reporting with amendments the bill as amended in the Senate, said (p. 3015):

"Mr. FITZGERALD. Mr. Speaker, the provision in the Senate bill provides authority for the construction,

purchase, or acquisition of approximately 3,000,000 tons of shipping in a period of 18 months. The proposed amendment which the House is asked to adopt is simply the rearranging the Senate amendment in more logical form and differs from it in four principal respects. First, it gives power to suspend contracts, as well as to cancel, modify, or requisition. In the Senate provision there was no authority to suspend a contract between private parties which might interfere with the Government requisitioning or requiring work to be done."

Page 3015:

"Mr. FITZGERALD. This legislation is of a very radical, unique, and unusual character. It confers the most comprehensive powers ever proposed upon the President of the United States. It authorizes him to requisition the entire output of a factory, a portion of a factory, to take over ships, to cancel contracts, to assume contracts, to suspend contracts, to operate the ships; and when the powers given here are exercised, provision is made to make just compensation for the taking over. Authority is given to the President to ascertain in a summary manner what the just compensation shall be, and if that compensation so determined shall not be satisfactory to the person affected then he shall be paid 75 per cent of that sum and given a right to proceed against the United States in the Court of Claims to recover such additional sum as will make just compensation."

Page 3018:

"Mr. FITZGERALD. They expect to get all of the trained mechanical help needed, and, if necessary, under this bill the President will have the power to suspend contracts where labor is utilized that can be utilized in shipbuilding, in order to get that labor diverted to the shipping work. That is one of the purposes of authorizing the suspension of contracts."

Page 3022:

Mr. CHARLES B. SMITH. Suppose a steel company is

now manufacturing steel for some purpose that is not in connection with the war and not for the purpose of carrying on the war, and suppose the Government wants to cancel contracts of that character and take the steel for ships or to build cars. Should not the Government have the right to cancel those contracts?

"Mr. LENROOT. Absolutely, and that far I am not making the slightest objection.

"Mr. CHARLES B. SMITH. Does this do more than that?

"Mr. LENROOT. Yes; it does. For instance, a building is being erected in my town. The contractor owns the material. The Government desires not a pound of that material, but under this power it can suspend the erection of that building in my city or your city for the sole purpose of driving those men out of employment and seeking to compel them voluntarily to seek employment elsewhere."

Pages 3023 and 3024:

"Mr. SHERLEY. Mr. Speaker, the gentleman from Wisconsin (Mr. Lenroot), it seems to me, takes rather an extreme view touching the construction to be placed upon subsection (b) of the proposed amendment to Senate amendment numbered 2, and whether his view be extreme as to the law I feel certain that his view is unwarranted as to the intent. I do not think anything has happened which warrants the assertion that this administration or any other administration, desires to close down factories for the purpose of putting men out of employment in order to compel them to work for the Government of the United States. But this situation is going to confront us: Beyond question we are going to see, not only in connection with the steel industry but in connection with many other industries, a total inability to perform the work for the Government that is necessary in the prosecution of the war, and at the same time perform the ordinary work that is performed in peace times, and no man when it comes to an issue of priority will hesitate for a moment as to the need and the right of the Government to claim that

priority for that work which is essential for it to successfully prosecute this war.

* * * * *

"The only effect of that would be to make further evident and apparent that the purpose of taking over or suspending or modifying a contract is because the performance of that contract necessarily interferes with the doing of something—in this instance the building of ships—necessary for the prosecution of the war; and in that way, I believe, it is easily possible to tie it within the powers that are given to Congress under the provisions of the Constitution that confer the right to declare war and necessarily prosecute it and to have all the powers that must flow from that first grant."

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Page 3024:

"Mr. DEMPSEY: Now, what that means, and what any court in the world would construe it to mean, is simply this: That if a plant is using material and labor for some other purpose, and that plant and that labor may be utilized for shipbuilding, then the President under this section would have the right, instead of allowing them to complete the labor which they have in hand and which is not useful for this great purpose which the Nation has in view, to go in and say, 'We will utilize this labor and this material, and instead of building a store or house we will use it for the purpose of shipbuilding.' That is all it means. We will turn this particular thing over. We will not send these men 1,500 miles away to seek labor elsewhere. But in the language of the section we will simply utilize this labor and this material where they are for shipbuilding. That is all it says."